Supreme Court, U.S.
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No. 02-584

In The Supreme Court of the United States

BRUCE MAGERS, TRUSTEE IN BANKRUPTCY FOR BONDS DISTRIBUTING COMPANY, INC.,

Petitioner,

v.

DONALD R. BONDS, BONDS, INC., and WILLIAM L. MILLS, III,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT WILLIAM L. MILLS, III'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In addition to the statement of facts set forth in the petition, the following undisputed facts should be noted:

Respondent William L. Mills, III[1] (hereinafter "Mills") is an attorney who was retained by Donald R. Bonds ("Bonds") to represent him in certain limited respects with regard to the November 7, 1995 sale of Bonds Distributing Company, Inc. ("BDI") to Stephen H. Young (hereinafter "Young"). Young had his own separate legal counsel, who served as the closing attorney. Following the closing, UCC-1 financing statements perfecting Bonds' security interest in the assets of BDI were filed with both the Register of Deeds of Cabarrus County, North Carolina by Mills, and with the North Carolina Secretary of State in Raleigh, North Carolina by Young's attorney. Although the UCC-1 filed by Young's attorney with the Secretary of State did not contain an address for Bonds, it was accepted and filed by that office. In addition, the UCC-1 filed in Cabarrus County by Mills contained a full address for Bonds as the secured party and was otherwise complete. Bonds had been in business in Cabarrus County for decades, and after the sale Bonds continued to maintain an office and presence at BDI, the address for which was listed in both filings.

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[1] In the lower courts and the Fourth Circuit, Mills contested subject matter jurisdiction and asserted that neither the Bankruptcy Court nor the District Court had jurisdiction over the third-party claims asserted against him by Bonds under 28 U.S.C. § 1334 or any other statutory provision, which issue was rendered moot by the circuit court ruling.

REASONS FOR DENYING THE PETITION

The sole question presented by the petition is whether a UCC-1 financing statement that omits only the secured party's address on the central filing, but includes the address on the local filing and is otherwise complete in all respects, substantially complies with the requirements and fulfills the notice purpose of former North Carolina General Statute § 25-9-402 (1995).[2] The Fourth Circuit correctly held that it did.

First, petitioner argues that the decision from the Fourth Circuit conflicts with an opinion from the Ninth Circuit in *In re Softalk Publishing Co., Inc.*, 856 F.2d 1328 (9th Cir. 1988). However, the Ninth Circuit's opinion does not hold what petitioner claims, but rather confirms the notice purpose of the statute consistent with North Carolina precedent as followed by the Fourth Circuit, as well as opinions from other federal courts. Accordingly, the petition must be denied.

Second, petitioner asserts that the Fourth Circuit's decision incorrectly applies North Carolina statutes and precedent. To the contrary, not only is the Fourth Circuit's opinion firmly in keeping with North Carolina law, but the applicable statute has since been revised and addresses the issue presented in this case. The revision supports the decision below and eliminates any need for review of the issue presented by the petition.

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[2] The statute was revised in 2001 as set forth below, which renders moot the issue presented by this case.

Accordingly, for the reasons set forth herein, respondent Mills respectfully submits that the Fourth Circuit's ruling was proper and that the petition for writ of certiorari should be denied.

I. The Fourth Circuit's Opinion Is Consistent With Decisions From Other Circuits, Including The Ninth Circuit.

Petitioner's asserted conflict between the Fourth Circuit's decision in this case and the Ninth Circuit decision in *In re Softalk* is artificial. A close review of both opinions demonstrates their harmony on key principles. First, both opinions emphasize the notice purpose of the UCC statute. The Ninth Circuit described it as follows:

> The financing statement serves to give notice to other creditors or potential creditors that the filing creditor might have a security interest in certain assets of the name debtor.
>
> * * *
>
> The financing statement . . . serves merely to alert third parties to inquire further; it therefore need not offer exhaustive details. "[T]he policy of [the Code is] to simplify formal requisites and the filing requirements and is designed to discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged themselves."

In re Softalk, 856 F.2d at 1330.

Second, both opinions adopt a holistic view of substantial compliance under the statute. As the Ninth Circuit noted, "[b]efore subsection 9402(8) will save a financing statement that contains errors, however, that financing

statement must substantially comply with the remainder of section 9402." *Id.* at 1331. The court further articulated its role as determining "whether the financing statement as a whole complies with section 9402." *Id.* at 1332. Therefore, the opinions agree on the fundamental notice purpose of the statute and the primary approach to the issue of substantial compliance therewith.

Moreover, the specific issue addressed in *In re Softalk* was different than the one decided by the Fourth Circuit in the present case. *In re Softalk* addressed the requirement that a financing statement contain a statement of the collateral covered thereunder. Specifically, the court in *In re Softalk* considered whether a financing statement which listed a security interest in "proceeds" adequately identified and perfected a security interest in "collateral." *Id.* at 1331. Noting the difference in those terms as defined under the UCC, the court held that potential creditors were entitled to rely on the accepted definitions, and thus the security interest was not perfected. *Id.* at 1332.

> A potential third party creditor encountering one of those terms in a bare-bones document such as a financing statement is entitled to rely on the accepted statutory meaning of that term in the absence of explicit language to the contrary apparent on the face of the financing statement itself. First City's financing statement contains no such contrary language.

Id. As implied by the Ninth Circuit, a statement of the collateral encumbered by a financing statement is more fundamental to the notice purpose than is information about the secured party's address.

Finally, the court limited its ruling to the specific facts presented. *Id.*

> Perhaps First City would have a valid argument if it had used some label other than "proceeds" to misdesignate its statement of collateral. That is not the situation in this case, however, and we express no opinion about the sufficiency of a financing statement that misdesignates the statement of collateral as something other than "proceeds."

Id.

Accordingly, there is no conflict between the circuits on the issue presented. In fact, the Fourth Circuit's opinion in the present case is likewise consistent with opinions from the Tenth Circuit, *Rooney v. Mason*, 394 F.2d 250 (10th Cir. 1968) (holding that absence of address for secured party does not invalidate financing statement), and the Fifth Circuit, *Matter of Bankrupt Estate of Smith*, 508 F.2d 1323 (5th Cir. 1975) (holding that absence of street address for debtor did not invalidate financing statement). As a result, the petition for writ of certiorari should be denied.

II. The Fourth Circuit Properly Applied North Carolina Statutes And Precedent.

Petitioner's argument that the Fourth Circuit failed to follow North Carolina law likewise lacks merit. The UCC uses a system of notice filing that allows for minor errors in filing. The statute "adopts a system of notice filing. . . . The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described." N.C.G.S. § 25-9-402, Official Comment. In fact,

the financing statement need only be a "skeletonic statement" that the parties intend to engage in further transactions. *Evans v. Everett*, 279 N.C. 352, 356, 183 S.E.2d 109, 112 (1971).

North Carolina General Statute § 25-9-402 (1995) provides that "a financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." N.C.G.S. § 25-9-402(8) (1995). Those requirements, at the time of the transaction at issue, were (1) the names of the debtor and the secured party, (2) the signature of the debtor, (3) "an address of the secured party from which information concerning the security interest may be obtained," (4) a mailing address of the debtor, and (5) a statement of collateral. N.C.G.S. § 25-9-402(1) (1995). The policy of notice filing can be seen throughout North Carolina precedent with regard to each of these requirements, and further reveals that minor errors in any of the requirements will not be fatal to perfection.

First, neither the name of the debtor nor the secured party must be exact in order to have a valid financing statement. For example, *In re Environmental Aspecs, Inc.*, 235 B.R. 378 (E.D.N.C. 1999), involved an adversary proceeding brought by the debtor EAI (parent) and EAI of NC (subsidiary) to determine the priority of security interests held by creditors SouthTrust and AAL in EAI of NC's property. SouthTrust filed financing statements in 1994 naming the debtor as EAI. *Id.* at 382. Later, in 1997, SouthTrust filed additional financing statements naming EAI of NC as the debtor. *Id.* at 383. In the interim, in 1996, AAL filed financing statements naming EAI as the debtor but attaching security agreements identifying the

debtor as EAI of NC. *Id.* at 383. The bankruptcy court held that AAL's lien had priority over that of SouthTrust. *Id.* at 382.

The district court affirmed. Upholding the UCC system of notice filing, the court held that the omission of the words "of North Carolina" on AAL's financing statement was not seriously misleading because the true identity of the debtor could be ascertained from an examination of the documents attached to the financing statement. *Id.* at 386. The court further held that SouthTrust's financing statement filed in 1994 was not effective because it was not signed by EAI of NC as the debtor. *Id.* at 388. *See also Matter of Southern Supply Company of Greenville, North Carolina, Inc.*, 405 F. Supp. 20 (E.D.N.C. 1975) (identification of debtor Southern Supply Company of Greenville, N.C., Inc. on the financing statement as Southern Supply Co. was not seriously misleading because the notice purpose was accomplished).

In addition, with regard to information about the secured party, the Fourth Circuit previously upheld the spirit of the statute and notice filing in the case of *In re Bumper Sales, Inc.*, 907 F.2d 1430 (4th Cir. 1990). In that case, the debtor borrowed money from Marepcon, whose trade name was Norshipco. *Id.* at 1432. Bumper Sales granted Marepcon a security interest, and Marepcon filed one financing statement listing it as the secured party and two others listing Norshipco as the secured party. *Id.* The unsecured creditors committee filed an objection challenging the proper perfection of Marepcon's security interest. *Id.* at 1433. The bankruptcy court held the security interest to be valid and perfected, and the district court affirmed. *Id.*

On appeal to the Fourth Circuit, the committee argued that the financing statements were seriously misleading because of the identity of Marepcon in one and the trade name Norshipco in the others. *Id.* at 1434. The Fourth Circuit rejected that argument, stating the issue was "whether or not 'a reasonably diligent searcher' would be misled by the irregularity." *Id.* at 1434. The court then drew a distinction between the purpose of information about the debtor and the secured party.

> [T]he use of the secured party's (as opposed to the debtor's) trade name is much less troubling, in part because the financing statement still gives notice that the debtor's assets may be encumbered and that further inquiry is warranted. [citations omitted]. Consistent with this thinking, the UCC does not require the secured party to refile a financing statement upon any post-filing changes in the secured party's name or identity, whereas it does impose a responsibility in certain circumstances to refile when the debtor's name changes. Va.Code § 8.9-402(7).

Id. at 1435.

Accordingly, the court held that the financing statements were not seriously misleading and gave sufficient notice to any prospective creditor. *Id. See also Rooney v. Mason*, 394 F.2d 250 (10th Cir. 1968) (upholding a financing statement omitting addresses of debtor and secured party because purpose of notice was satisfied in that addresses were readily obtainable and known).

Second, North Carolina courts have even permitted leniency with regard to the debtor's signature. *See, e.g., Mountain Farm Credit Service, ACA v. Purina Mills, Inc.*, 119 N.C. App. 508, 459 S.E.2d 75 (1995). In *Mountain*, two

secured parties, Purina Mills ("Purina") and Mountain Farm Credit Service ("MFCS"), claimed entitlement to proceeds from the sale of debtor's cattle. *Id.* at 509, 459 S.E.2d at 77. Debtor sold its cattle and paid MFCS, but did not pay Purina because debtor did not consider it a creditor. *Id.* Purina had obtained a security agreement and filed a financing statement; however, it was only signed by one partner and listed as the debtor the two partners individually doing business as the partnership. *Id.* at 511, 459 S.E.2d at 78. MFCS contended that Purina's security interest in the debtor was flawed because the partner signed as an individual not authorized to so sign, and the debtor was listed incorrectly. *Id.* Purina demanded payment from MFCS, which then brought a declaratory judgment action to determine who was entitled to the proceeds. *Id.* at 509, 459 S.E.2d at 77.

The trial court held that Purina's security interest was perfected and Purina was entitled to receive the proceeds from MFCS. *Id.* at 501, 459 S.E.2d at 78. The North Carolina Court of Appeals reiterated the purpose of a financing statement to provide notice to third parties of the debtor-creditor relationship. *Id.* at 513, 459 S.E.2d at 80. The court found that the correct debtor was listed in the debtor box and a search request under debtor's name located Purina's financing statement. *Id.* The court further found sufficient evidence that the partner's signature was made on behalf of the partnership and that he was authorized to sign. *Id.* at 513, 459 S.E.2d at 79. Thus, the court held that this comported with the statutory requirements, and that the financing statement was perfected. *Id.* at 514, 459 S.E.2d at 79.

Recently, in *In re Lea Lumber & Plywood LLC*, 266 B.R. 342 (E.D.N.C. 2001), the United States Bankruptcy

Court for the Eastern District of North Carolina held perfected a financing statement that was signed by an individual employed by the debtor's manager, even though no evidence of the agency relationship appeared on the face of the filing. *Id.* at 348. In doing so, the court noted that

> the function of the financing statement is not compromised by this error. The financing statement places full and accurate notice of [the] security interest on the public record, thereby serving its intended purpose under the Uniform Commercial Code.

Id. at 349. The court also took judicial notice of the revision of the statute (effective July 1, 2001, after the events of this case) eliminating the debtor's signature as a requirement for perfection. *Id.*

Third, although North Carolina had not previously addressed the issue of a secured party's address[3], the courts have held that the address for the debtor in a financing statement need not be complete so long as it provides proper notice. *E-B Grain Co. v. Denton*, 73 N.C. App. 14, 325 S.E.2d 522, *rev. denied*, 313 N.C. 598, 330 S.E.2d 608 (1985).

In *E-B Grain*, defendant alleged that a financing statement did not contain the debtors' mailing address as

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[3] However, the issue has been decided by the Tenth Circuit in *Rooney v. Mason*, 394 F.2d 250 (10th Cir. 1968), which held perfected a security interest even though the filing did not include an address for the secured party or the debtor.

required by the statute and therefore the financing statement was defective. *Id.* at 21, 325 S.E.2d at 527. The debtors' address was listed as "Whitakers, N.C. 27891" on the financing statement. *Id.* The North Carolina Court of Appeals concluded that the debtors' mailing address was not so incomplete as to be misleading or interfere with the notice function of the filing, especially where the third party had regular business dealings with the debtors and would not have been prejudiced by any technical defects in the filing. *Id.* Thus, the court held that the filing was not defective.

Moreover, unlike the address for the debtor, a financing statement need only contain "an address for the secured party from which information concerning the security interest may be obtained." N.C.G.S. § 25-9-402(1) (1995). Thus, the requirement for the secured party's address is less stringent. In fact, the address requirement "is not to identify the secured party of record but rather to provide an address to which others can send required notifications. . . . " N.C.G.S. § 25-9-516, Comment. As the Fourth Circuit correctly observed, this requirement functions primarily to protect secured parties (Bonds) and not those dealing with the debtor (trustee). In keeping therewith, the Fourth Circuit previously held that information about the secured party (as opposed to the debtor) is less important to the purpose of the financing statement. *In re Bumper Sales, Inc.*, 907 F.2d 1430 (4th Cir. 1990).

In the present case, the financing statement at issue contained an address for BDI, where Bonds could be contacted, and provided another address for Bonds on the Cabarrus County filing. Therefore, the Fourth Circuit's opinion below is consistent with North Carolina state and

federal court precedent, and correctly held pursuant thereto that the financing statement put third parties on notice of the transaction, substantially complied with the statutory requirements, and was perfected. Accordingly, the petition for writ of certiorari should be denied.

III. Recent Amendments To The North Carolina Uniform Commercial Code Nullify Any Alleged Legal Import Of This Case.

Finally, the amendment of Article 9 of the Uniform Commercial Code by the North Carolina Legislature, effective July 1, 2001, renders this matter a dead issue. New Section 25-9-502 now governs the contents of a financing statement and requires for sufficiency only that the statement provide the name of the debtor, the name of the secured party or a representative of the secured party, and the collateral covered. N.C.G.S. § 25-9-502(a) (2001).[4] Any requirement for an address of either the debtor or the secured party has been eliminated.

In fact, the Comment to the new Section 25-9-506 governing the effect of errors or omissions explains that an error in even the name of the secured party (much less the address, which is no longer even required) will not be seriously misleading. N.C.G.S. § 25-9-506 (2001), Comment. Additionally, the Comment to new Section 25-9-516, listing grounds for which the filing office may refuse to

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[4] Section 25-9-502 now provides that a financing statement is sufficient if it "(1) Provides the name of the debtor; (2) Provides the name of the secured party or a representative of the secured party; and (3) Indicates the collateral covered by the financing statement."

accept a financing statement, states that the lack of an address for the secured party would not render a filed statement ineffective. N.C.G.S. § 25-9-516 (2001), Comment.

Therefore, under the current law, the financing statement at issue, having been accepted for filing by the filing office, would be perfected. Accordingly, the issue presented by the present case will never arise again, and thus this case lacks any legal significance. Even under prior law, however, the decision of the Fourth Circuit was correct. For these reasons as well, the petition for writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, respondent William L. Mills, III respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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